

Contractors in the Workplace



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Introduction

- **Generally, conflict of interest (COI) laws and Standards of Ethical Conduct, including JER, do not apply to contractor employees, even when:**
 - **Performing the same/similar work**
 - **Working side-by-side in the federal workplace, contractor workplace, or on the battlefield**
 - **Different loyalties**
 - **Result? Ethical Issues and actual or apparent COIs**

Contractor Ethics

“Rules”

- **Certain COI laws (e.g. bribery)**
- **False statement/false claims laws**
- **Procurement Integrity Act**
- **Federal Acquisition Regulation (FAR)**
 - **(3.104) Procurement integrity**
 - **(3.2) Contractor gratuities to govt personnel**
 - **(9.1) Responsible contractors**
 - **(9.4) Debarment/Suspension**
 - **(9.5) Organizational and Consultant COI**
 - **(37.104) Personal Services Contracts**

Some Different Perspectives

- **Treat certain contractor personnel like Government employees (WRONG!)**
- **Use contract clauses**
- **Identify and remedy conflicts/issues on a case-by-case basis**
- **Let contractors self-regulate and self-report**
- **Amend Ethics laws and regulations to apply more broadly to Government contractors**

Why are Contractor Ethics Important Now?

- **Many federal contractors**
 - **72,000 contracts worth over \$215B***
 - **5.6M contractor personnel worked on federal contracts****
 - **DoD approximately 60% contractor personnel**

*** GSA Federal Procurement Data Center**

**** Data from Paul C. Light, The True Size of Government, (1999), as of 1996**

Why are Contractor Ethics Important Now?

- **The Competitive Sourcing Initiative**
 - Open up 425,000 federal “commercial” jobs to public-private competition
 - OMB told agencies to compete 15% of commercial jobs by October
 - DoD competing 30,000 commercial civilian positions*
 - Army 3d wave initiative would subject 200,000+ employees and soldiers to competition (biggest competition ever)
 - DoE’s 1000-IT position competition (largest civilian competition ever)*

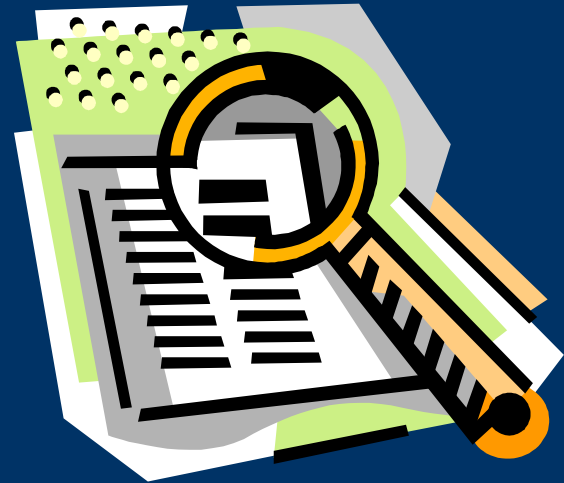
*Mark Everson, The President’s Management Agenda, An Update, The Journal of Public Inquiry, Fall/Winter 2002

Why are Contractor Ethics Important Now?

- **OMB Cir. A-76 (29 MAY 03)**
 - **Public-private competition should be the rule for all commercial activities**
 - **Agencies must presume all activities are commercial unless justified as inherently governmental**

Traditional Contracts

- **Procurement of supplies, equipment, weapons systems**
- **Services: maintenance, custodial, food services**
- **Construction**



Less Traditional - But Pervasive

- IT Help Desk
- Finance & Accounting (inherently governmental)
- Travel & Transportation
- Personnel Admin
- Clerical & Admin
- Studies
- Action Officers



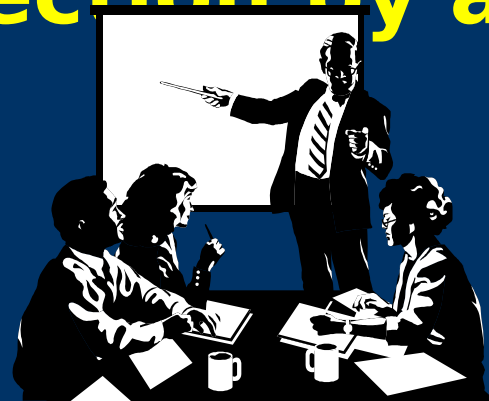
Risk of Unlawful Personal Services Contracts

- Appearance of employer/employee relationship
- Prohibited unless authorized specifically by statute
 - Subverts civil service law and OPM regulations



Test of Federal Employment

- **Performance of a federal function**
- **Appointment or employment by a federal officer**
- **Supervision or direction by a federal officer**



Govt & Contractor Can:

- Understand and agree that the services to be delivered are nonpersonal services
- Recognize and agree that no employer-employee relationship exists under the contract b/w the Gov't and the contractor's personnel



Contractor Personnel Cannot:

- **Be placed in a position where they are under supervision, direction, or evaluation of a govt employee**
- **Be placed in a position of command, supervision, administration, or control over govt personnel, or over personnel of other contractors; or become part of the govt organization**
- **Be used in administration or supervision of govt procurement activities**
- **Query: Can contractor employees use Agency logo, seal, or name on business cards?**

Awards

- **Military personnel (10 USC 1124/1125) and civilian employee incentive awards (5 USC 4511-4513) are based on statute**
 - **Contractor employees are not authorized recipients of these awards**
- **Contracts may include provisions for awards (incentive fee; award fee; etc)**

Awards

- **Contractors have their own awards and bonus programs**
- **Govt may provide honorary awards (certificates and other small items in agency honorary award program, DoD 1400.125-M, sec. 0.2.b)**
 - **Always coordinate proposed honorary award with contracting officer**

Awards

- **Query: May commander's coins be given to contractor employees?**
 - **Yes, but ONLY IF coins purchased with personal funds**
 - **No, if coins purchased with appropriated funds**



Time Management

- **Contractor employees work on clock controlled by contractor supervisor - not govt supervisor**
- **Leave and other time off controlled by contractor supervisor**
- **Holidays and other time off governed by contract, not govt supervisor**
 - **“59 Minute Rule” and training holidays are unavailable to contractors**

Time Management

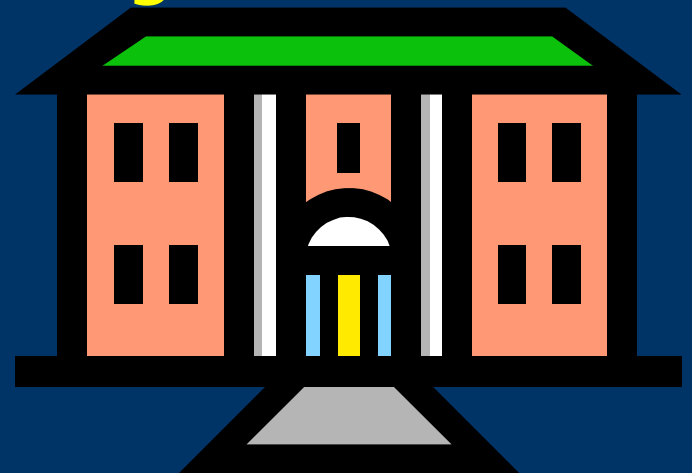
- **Organization Day - May contractors participate? Yes, if:**
 - **Invited by govt, and**
 - **Contractor supervisor approves, and**
 - **Contractor employees are in leave or other non-billing status**

Use of Resources

- **Contractor-furnished resources**
 - At discretion of contractor - BUT - time billed to govt must be on performance of contract
- **Govt-furnished resources**
 - Used IAW govt furnished equipment clause in contract
 - Used only in performance of contract, unless contract allows other use
 - More restrictive than “authorized use” in JER
 - Query: May a contractor employee use a govt phone to call home? Send personal email on govt network?

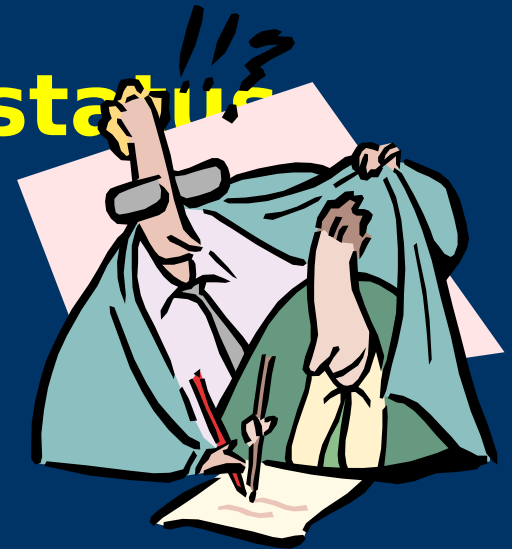
Identity

- **Work site**
 - **Contractor space**
 - **Govt space**
 - **Segregated or intermingled?**
 - **Battlefield**



Personnel

- **Identify contractor personnel in email, phone calls, meetings**
- **Be able to distinguish - badges or other identifier**
- **Be aware of different status**



Gifts

- **Contractor employees are prohibited sources**
 - General rule – no gifts solicited or accepted
 - No solicitation for retirement or other gift for Gov't employees



Gifts

- **Exceptions:**

- **Item not a gift - coffee, donuts**
- **Gift up to \$20/occasion; \$50/year**
 - **BUT no cash may be accepted in any amount**
- **Based on personal relationship**
 - **Query: Can personal relationship be established on the job?**
- **Best to accept nothing from contractors**

Gift Examples

- Office chief (Gov't) invites contractor and family members, including contractor employees, to dinner
 - Problem with gratuity to contractor?
 - Contractor brings bottle of fine wine or flower arrangement (>\$20). Issues?
 - Contractor reciprocates; invites host to dinner. Problem?



Gift Examples

- **Organization Day Fund Raising**
 - **May contractors be asked to participate? Yes.**
 - **May we accept if contractor volunteers? Yes, but do not accept donations of \$\$\$.**
 - **Hot dog/bake sale in workplace - May contractors purchase? Yes.**

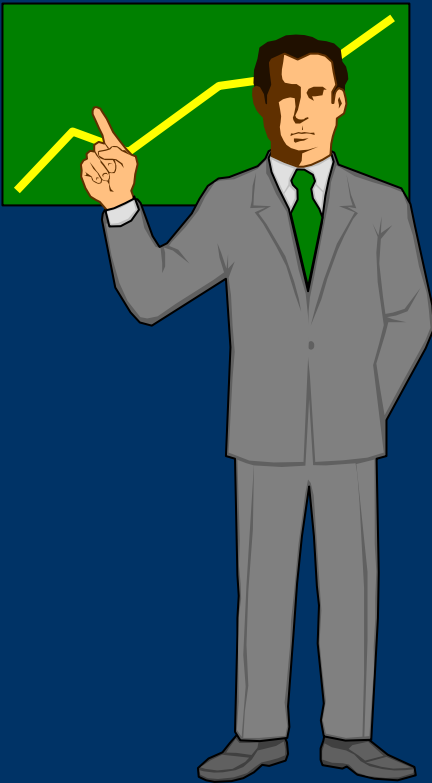
Information Security

- **Classified - Are they cleared? Do they need to know the information?**
- **Integrity of procurement process**
 - **Advance procurement info**
 - **Proprietary Info/Trade Secrets**
 - **FOUO - exempt from release under FOIA**
 - **Releasable to contractor only if protected by appropriate contract clauses and non-release declarations**

Statutes and Regulations

- **Trade Secrets Act**
 - Criminal to disclose a firm's trade secrets or confidential data
- **Procurement Integrity**
 - Proprietary information submitted with bids or proposals
- **Standards of Ethical Conduct**
 - Prohibits use of nonpublic info (by govt employees) for private gain (by anyone)

Information Protection



- Badges or other means to identify status
- Identify all members of audience before disclosing sensitive info
- Question contractor presence at meetings where sensitive issues may be discussed

Information Protection



- **Segregate work spaces, where possible**
- **Protect proprietary info**
 - **Ensure distribution chain is secure**
 - **Limit email distribution**

Personal Relationships

- **Varying degrees from acquaintance to marriage**
- **Conflicts of interest must be identified and resolved**
- **Sensitive info must be protected**
- **Be aware of appearances and impact on working environment**

Questions?

